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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals erred under Fed. R. Civ. P. 56(c) in making its summary finding, without evidentiary support and without remanding to the district court for the development of facts, that the term "damages" appearing in standard-form comprehensive general liability insurance policies has a narrow, technical meaning in the insurance context that differs from its broader meaning to lay policyholders, thereby precluding coverage under the policies for environmental cleanup costs incurred by state and federal governments?

2. Whether the Eighth Circuit Court of Appeals, in a case based on diversity jurisdiction, erred in failing to follow the rule of decision in Missouri that insurance policy terms are construed as they would be understood by laypersons, and instead, following a conflicting rule of other forums, thereby holding that the term "damages" in standard-form comprehensive general liability insurance policies does not include policyholders' liability for environmental cleanup costs incurred by state and federal governments?

THE PARTIES

Petitioner is the state of Missouri. Respondent is Continental Insurance Companies ("Continental"), a New Hampshire corporation. Additional parties include Northeastern Pharmaceutical & Chemical Co., a Delaware corporation, and Milton Turkel, Edwin B. Michaels, and John W. Lee, all residents of Connecticut.

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OPINIONS OF THE DISTRICT COURT AND COURT OF APPEALS

The district court's opinion in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, No. 5034-CV-S-4 (W.D. Mo.), was filed June 25, 1985 (Appendix at A63-82). That opinion is not officially reported.

The Eighth Circuit Court of Appeals panel decision issued Jan. 22, 1987 is reported at 811 F.2d 1180 (8th Cir. 1987). Petitions for rehearing *en banc* were granted, and the order granting rehearing is reported at 815 F.2d 51 (8th Cir. 1987). The Eighth Circuit's *en banc* decision dated February 26, 1988 is reported at 842 F.2d 977 (8th Cir. 1988).

JURISDICTIONAL STATEMENT

This petition for writ of *certiorari* seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., et al.*, 842 F.2d 977 (8th Cir. *en banc* 1988). The Eighth Circuit denied petitioner's petition for rehearing on May 4, 1988. Petitioner state of Missouri seeks a writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF STATUTES AND RULES INVOLVED IN THIS CASE

This case involves a dispute concerning insurance coverage for liability asserted by the state of Missouri against a comprehensive general liability insurance policyholder pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). This case also involves the application of Rule 56(c) of the Federal Rules of Civil Procedure. Pursuant to Supreme Court Rule 21(f), the text of CERCLA section 107(a) and Rule 56(c) are set out below.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

Sec. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which cause the incurrence of response costs, of hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

* * *

42 U.S.C. § 9607(a).

FEDERAL RULE OF CIVIL PROCEDURE 56

* * *

(c) **Motion and Proceedings Thereon.** The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

STATEMENT OF THE CASE[1]

This case arises out of standard-form comprehensive general liability ("CGL") insurance policies issued from 1970 to 1972 to Northeastern Pharmaceutical & Chemical Co. ("NEPACCO") and involves NEPACCO's insurance coverage for costs incurred by the United States and the state of Missouri to clean up environmental contamination pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, and other provisions of statutory and common law.

At issue in this appeal is the manner in which the Eighth Circuit, in reviewing an entry of summary judgment, interpreted a critical, disputed standard-form insurance policy term: "damages." In affirming summary judgment on grounds other than those relied upon by the trial court the Eighth Circuit held that to a lay policyholder the term "damages" is ambiguous and broad enough to cover CERCLA environmental cleanup costs, but concluded that "damages" has a narrower, technical "plain meaning" in the insurance context that excludes such costs. *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-86 (8th Cir., *en banc* 1988). Appendix at A18-19.

In the trial court Continental conceded that governmental claims for reimbursement of CERCLA hazardous waste site cleanup costs were "damages." *See* note 10, *infra*. The Eighth Circuit's finding that "damages" has a "plain meaning" in the insurance context that differs from its meaning to the layperson was not presented to the trial court and has no factual support in the record.

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1. Extensive discussions of the factual and procedural history of this case are found in the *en banc* order, *Continental Insurance Cos. v. NEPACCO*, 842 F.2d 977 (8th Cir. *en banc* 1988) (Appendix at A1-30) and in the panel decision, *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 811 F.2d 1180 (8th Cir. 1987). Appendix at A31-62.

Moreover, in this action based upon diversity jurisdiction in which the law of Missouri is conceded by all to apply, the Eighth Circuit interpreted the disputed policy term by relying upon the law of other jurisdictions while failing to apply Missouri's rule of insurance policy construction requiring that an insurance policy term be interpreted as it would be understood by the lay policyholder.

1. The Underlying Claims Against NEPACCO Based Upon Environmental Damage.

From 1970 to 1972 NEPACCO produced hexachlorophene at a chemical plant in Verona, Missouri. The process produced a variety of wastes, including dioxin. In July 1971 NEPACCO arranged to dispose of at least 85 55-gallon drums of these wastes in a trench on a farm near Verona, Missouri, which has come to be known as the "Denney Farm site."

Later in 1971 or 1972 NEPACCO hired Independent Petrochemical Corporation ("IPC") which, in turn, hired Russell Bliss to dispose of more dioxin-contaminated wastes. In 1971, 1972, and 1973, these wastes were spread on the Bubbling Springs Stables in Fenton, Missouri and on the roads of Times Beach, Missouri. In 1974 a Mr. Minker purchased contaminated dirt from the Bubbling Springs Ranch and used it as landfill on his property, which came to be known as the "Minker/Stout/Romaine Creek site."

In 1980 the United States Environmental Protection Agency ("EPA") investigated the Denney Farm site and found dioxin from the NEPACCO wastes. It cleaned up the site and then sought to recover its costs through a lawsuit against NEPACCO and others. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, ...

U.S. ....., 108 S.Ct. 146 (1987). This lawsuit is referred to in the decisions below as the "*EPA* suit." As a result of that lawsuit, NEPACCO and the other defendants have been held jointly and severally liable for cleanup costs of more than $150,000.[2]

2. NEPACCO's Insurance Coverage.

From 1970 to 1972 NEPACCO was insured under three standard-form comprehensive general liability ("CGL") insurance policies issued by Continental Insurance Company. Each policy requires Continental to:

> Pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages* because of . . . property damage to which this insurance applies caused by an occurrence . . . .

(Emphasis added.) Although several policy clauses have been the subject of contention in this action, this clause is the only one at issue in this petition.[3]

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2. CERCLA establishes a trust fund—typically referred to simply as the "Superfund"—administered by EPA to pay for a variety of activities to identify, investigate and clean up where necessary sites at which hazardous substances are posing a health or environmental threat. CERCLA § 111, 42 U.S.C. § 9611. Often these sites are old, abandoned hazardous waste disposal sites.

When EPA incurs costs to clean up a hazardous waste disposal site it may sue pursuant to CERCLA § 107(a)(1-4)(A), 42 U.S.C. § 9607(a)(1-4)(A), any of several classes of potentially responsible parties to reimburse it for its cleanup costs, sometimes referred to as "response costs." *See, e.g., U.S. v. NEPACCO*, 810 F.2d 726, 731.

States, including the state of Missouri, also frequently undertake their own hazardous waste site cleanup activities. States also may sue potentially responsible parties pursuant to CERCLA § 107(a)(1-4)(A) to recover their cleanup expenses.

Such state and federal governments' cost recovery claims pursuant to CERCLA § 107 and pursuant to other statutes or common law seeking reimbursement for their costs incurred in cleaning up hazardous waste site contamination are at the heart of this insurance coverage dispute.

3. The Eighth Circuit expressly stated that because of its ruling on the meaning of the word "damages" in this clause, it did not need to reach the other numerous issues raised on appeal. Appendix at A13-14.

3. Proceedings in the District Court.

a. Continental's Declaratory Judgment Action.

In February 1984 Continental filed in the United States District Court for the Western District of Missouri this action against NEPACCO and its former officers and directors. *Continental Insurance Cos. v. NEPACCO,* No. 84-5034-CV-S-4 (W.D. Mo. filed Feb. 9, 1984). Continental sought a declaratory judgment that it had no duty to defend or to indemnify NEPACCO or its former officers for liability arising out of NEPACCO's waste disposal, including the judgment in the *EPA* suit.

The district court's jurisdiction was invoked by diversity of citizenship, with an amount in controversy exceeding $10,000, pursuant to 28 U.S.C. § 1332.[4] Throughout the district and appellate court proceedings, all parties have agreed that Missouri law applies.

NEPACCO and the other defendants failed to enter an appearance or file an answer.[5] Rather than seeking a default judgment against NEPACCO and the other defendants, in November 1984 Continental moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

b. State of Missouri Action to Intervene.

In December 1984 the state of Missouri moved to intervene in the present case to protect its interest as a

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4. The plaintiff, Continental, was a New Hampshire corporation with its principal place of business in New York. Defendant NEPACCO had been a Delaware corporation with its principal place of business in Connecticut (*U.S. v. NEPACCO,* 810 F.2d at 729). Defendants Turkel, Michaels, and Lee, NEPACCO's former officers, were residents of Connecticut.

5. By 1984 NEPACCO essentially had been defunct for ten years. *See United States v. Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823, 827 (W.D. Mo. 1984).

potential judgment creditor of NEPACCO.[6] The district court granted the state's motion.

The state filed suggestions opposing Continental's motion for summary judgment. Among other grounds, the state asserted that disputed issues of material fact, including the parties' intent in entering the contracts for insurance coverage, precluded summary judgment under Rule 56(c).[7] At the time the district court entered summary judgment, discovery was pending.[8]

In the district court proceedings Continental did not raise the contention—later adopted by the Eighth Circuit in its *en banc* decision—that the term "damages" in the standard-form policies issued to NEPACCO excluded governmental claims for reimbursement of environmental cleanup costs asserted against NEPACCO pursuant to CERCLA. Although its complaint in this action contains 23 pages of detailed allegations stating why Continental believed it should not be required to provide coverage, and

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6. The state of Missouri has filed three actions against NEPACCO and others as a result of costs incurred in cleaning up dioxin contamination in Times Beach, the Minker/Stout/Romaine Creek site, and the Bliss farm site (at which Mr. Bliss also allegedly sprayed dioxin-contaminated oil). *Missouri v. Syntex U.S.A., Inc. et al.*, No. 85-2856-C-6 (E.D. Mo. filed Nov. 27, 1985); *Missouri v. Independent Petrochemical Corp., et al.*, No. 83-3670 (E.D. Mo. filed Nov. 23, 1983) (referred to as the "IPC Suit" in the district court and court of appeals opinions); *Missouri v. Bliss, et al.*, No. 84-1447-C(4) (E.D. Mo. filed June 20, 1984).

As of November 1986 the state of Missouri already had spent nearly $3 million to clean up the dioxin contamination at these sites, and cleanup is ongoing. The state's projected share of the cost to clean up the four primary dioxin-contaminated sites in Missouri (Times Beach, the Minker/Stout/Romaine Creek site, Quail Run, and Castlewood) is $20 million.

7. Defendant-Intervenor State of Missouri's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment, at pp. 6-7, served March 8, 1985.

8. *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. filed June 25, 1985). Appendix at A66-67.

cites no fewer than 9 policy terms and provisions, nowhere does the complaint assert that costs at issue are not "damages."[9] Indeed, Continental conceded that the environmental cleanup cost recovery claims asserted against NEPACCO and its former officers in the *EPA* suit constituted claims for *"damages."*[10]

c. The District Court Decision.

In June 1985 the district court granted summary judgment in favor of Continental.[11] Among its rulings, the court held that the environmental cleanup costs sought by the United States and the state were not "property damage" as that term is defined in the CGL policies. Appendix at A75. Moreover, the court held that "no . . . damages were incurred by the governmental entities during the time of the policies' effective dates" because the policies were in effect only from 1970 to 1972, whereas the cleanup costs were incurred many years later, in 1980 and 1982, after the policies had expired. Appendix at A68, 74-76.[12]

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9. Continental's complaint is supplied in the Appendix at A85-105.

10. *See* Suggestions in Support of Plaintiff's Motion for Summary Judgment in *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. filed Nov. 14, 1984). Continental said, "CERCLA authorizes the government to seek *as damages* the reimbursement of hazardous waste cleanup costs . . ." (emphasis added) at 38; and, "All *damages* claimed [in the *EPA* suit] are in the nature of 'clean-up' costs" (emphasis added) at 42. *See also id.* at 19-20, 29, 32, 38 and 52 (characterizing CERCLA cost recovery actions as seeking "damages"). Excerpts are supplied in Appendix at A106-14; see particularly, pp. A108-09, 111, 113.

11. *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985). Appendix at A63-83.

12. Notably, the district court concluded, without discussion, that the state and federal government CERCLA cost recovery claims sought "damages" against NEPACCO. Appendix at A71-72, 74 (referring to such claims as "damages") and A75-76 (referring to such claims as claims for "loss or damage").

4. Proceedings in the Court of Appeals.

a. The Panel Decision.

The state of Missouri appealed the district court's order. The argument that environmental cleanup costs under CERCLA do not constitute "damages" under the standard-form CGL policy was raised for the first time —by *amicus curiae* American Insurance Association ("AIA")—before the Eighth Circuit panel.

The majority rejected the district court's rationale for holding that insurance coverage did not apply to the *EPA* suit. The majority rejected the view that the federal and state governments did not suffer any loss or damage until cleanup costs actually were incurred. Appendix at A42-44. The panel also rejected the argument advanced by AIA that cleanup costs under CERCLA were not "damages." Appendix at A44-49.

The court discussed the events that trigger coverage under standard-form CGL policies (Appendix at A77-81), but that discussion is not the subject of this petition.

b. Rehearing En Banc.

The Eighth Circuit granted motions for rehearing *en banc* and in a 5-to-3 decision reversed the panel opinion. In doing so the court stated, "The dispositive issue is whether the term 'damages' in the standard-form CGL policy includes cleanup costs." Appendix at A13.

The court held that the term "damages" is ambiguous to laypersons and would be interpreted by the policyholder to include governmental claims for reimbursement of hazardous waste site cleanup costs. Nevertheless, the court found—without any basis in the factual record before the court—that in the *insurance context* the term "damages" is *not* ambiguous and has a narrower, technical meaning that precludes coverage for such

costs. The court noted that claims for these costs are considered "equitable" claims for monetary relief, and stated that CGL policies do not provide coverage for equitable relief. Appendix at A17-18.

The court did not cite any Missouri cases for these propositions, but cited cases applying the law of Maryland, Florida and New Hampshire. Appendix at A18-20.

The state of Missouri now brings this petition seeking review of the Eighth Circuit's *en banc* order.

ARGUMENT AND AUTHORITIES

I. The Court of Appeals' Summary Finding That "Damages" Has An Unambiguous Narrow, Technical Meaning In The Insurance Industry Is A Factual Determination Which Cannot Be Made In An Evidentiary Void On A Motion For Summary Judgment.

The Eighth Circuit's result is premised upon its conclusion on page 16 of its February 26, 1988 order:

> [T]he plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief.

Appendix at 18. Although stated in a conclusory fashion, this determination is based upon the implicit factual finding[13] that the term "damages" has a meaning in the in-

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13. While the court attempted to frame its finding as a matter of law, it was a factual finding. First, the court stated that the term "damages" excludes claims for equitable relief as a matter of "[b]lack letter insurance law." Appendix at A18. As the dissent notes, however, the conflict in the courts renders this characterization inappropriate. Appendix at 26.

Moreover, while courts may impart a particular meaning to a contract term, this does not create a presumption that such a meaning was intended unless courts repeatedly have interpreted certain words as having a particular meaning and

(Continued on following page)

surance context that differs from its meaning elsewhere. In the preceding paragraph of its opinion the court held that

> outside the insurance context, the term "damages" is ambiguous . . . [F]rom the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs or losses.

Appendix at A17-18. Thus, the court drew a clear distinction between the manner in which laypersons interpret the term "damages" and what the court perceived to be a narrower interpretation of that term in the "insurance context." The only basis asserted for creating this distinction is the fact that governmental claims under CERCLA for reimbursement of hazardous waste site clean-up costs have been held to be "equitable," rather than "legal," monetary claims for restitution. Appendix at A17-18.[14]

Footnote continued—

drafters continue to use such words with knowledge of the courts' interpretation. *See, e.g., Parker v. Provident Life & Acc. Ins. Co.*, 582 S.W.2d 380, 383 (Tenn. 1979).

In addition, as discussed in Subpart I.B., *infra*, the court implicitly found a custom and usage in the insurance industry. This is a factual determination requiring factual support.

Finally, the authorities on which the court relied do not adequately support its conclusion that "damages" has a specialized meaning in the insurance context. This determination, in the first instance, must be based on factual evidence. None of the courts cited by the majority conducted any factual inquiry regarding the manner in which insurers interpret the term "damages." Absent such an inquiry and a well-supported factual finding, the issue cannot be disposed of as a matter of law.

14. Courts which have discussed the "equitable" nature of environmental cost recovery claims under CERCLA have done so in the context of ruling that defendants in actions brought pursuant to CERCLA do not have a right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution. *See U.S. v. NEPACCO*, 810 F.2d at 749 and cases cited therein.

The argument that the term "damages" does not include governments' CERCLA cost recovery claims was not presented to the trial court, however, and there is not a single fact in the record to support the conclusion that the term "damages" in the insurance industry is interpreted any differently than it is understood by lay policyholders. It was improper for the Eighth Circuit to affirm summary judgment on the basis of an argument which was not presented to the trial court and which is not supported by the record. Moreover, it was improper for the court of appeals, on summary judgment pursuant to Rule 56 and without the benefit of any evidence, to make the factual determination that the term "damages" has a "plain meaning" in the insurance industry that differs from its meaning elsewhere. Indeed, a substantial body of evidence makes clear that both the insurance industry and Continental consistently use the term "damages" to include environmental cleanup and CERCLA response costs. Because of the procedural posture of this case, the state never had an opportunity to develop or present that evidence. Its existence makes clear, however, that judgment in Continental's favor was inappropriate because there remained at least one disputed issue of material fact.

A. It Was Improper For The Eighth Circuit To Affirm Summary Judgment On The Basis Of An Argument Presented For The First Time On Appeal For Which There Is No Support In The Record.

The Eighth Circuit rejected the rationale of the district court, but elected to affirm summary judgment because of the appellate court's narrow interpretation of the term "damages" in the insurance context. The issue whether "damages" includes governmental claims for reimbursement of environmental cleanup costs first was raised by *amicus* AIA on appeal. The issue was not

raised by a party until Continental filed its supplemental brief for rehearing *en banc*. Appendix at A15. Undoubtedly based upon Continental's concessions on the matter, the district court assumed without discussion that those claims were "damages."[15] Needless to say, no evidence was presented to the district court to support AIA's assertion. It was, therefore, inappropriate for the Eighth Circuit to affirm summary judgment on this ground.

A court reviewing an entry of summary judgment is "merely authorized to review the propriety of the grant *on the basis of matters of record at the time the summary judgment was entered.*" *Munoz v. International Alliance of Theatrical Stage Emp. & Moving Picture Mach. Operators*, 563 F.2d 205, 209 (5th Cir. 1977) (emphasis supplied). Evidence and factual assertions not presented to the trial court will not be considered on appellate review. *Id.* at 209; *Denis v. Liberty Mutual Ins. Co.*, 791 F.2d 846, 849 (11th Cir. 1986). "Failure to raise an issue, objection or theory of relief in . . . the trial court generally is fatal." *Denis*, 791 F.2d at 849.[16]

A reviewing court may affirm summary judgment on grounds which differ from those of the trial court. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 363 (4th Cir. 1985). At least one court has held that the ground for affirmance need not have been addressed by the trial court, but it *must be supported by the record*. *Katter v. Arkansas Louisiana Gas Co.*, 765 F.2d 730, 734-35 (8th Cir. 1985). In the present case, the court affirmed summary judgment on grounds for which there is no record and

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15. *See* discussions at notes 10 and 12, *supra*.

16. *See also, Federal Deposit Ins. Co. v. Lauterbach*, 626 F.2d 1327, 1331 n.8 (7th Cir. 1980) (objections); *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978) (allegations); *Lacey v. Lumber Mutual Fire Ins. Co. of Boston*, 554 F.2d 1204, 1205 (1st Cir. 1977) (arguments).

which were conceded away in the trial court. See Appendix A108-09, 111, 113.

The Eleventh Circuit has held that "the appellate court has the discretion to resolve a question for the first time on appeal, especially if the issue is legal in nature and failure to consider it would result in a miscarriage of justice." *Denis*, 791 F.2d at 849. This Court also has recognized the appellate court's discretion to consider questions not presented to the trial court but only when "the proper resolution is beyond any doubt [citation omitted] or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976).

As discussed in note 13, *supra*, this case involves a factual question, not a legal issue. Moreover, the state has not had the opportunity to contest, in an appropriate forum, the factual conclusion that the term "damages" has a specialized meaning in the insurance industry. The state is prepared to contest this finding, however, as discussed, *infra*, Subpart I.C. Thus, the existence of a "plain meaning" of the term "damages" in the insurance context is not "beyond any doubt," as required by this Court's ruling in *Singleton*. Finally, as in *Singleton*, "injustice [is] more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." 428 U.S. at 121, 96 S.Ct. at 2877. Because evidence exists which directly controverts the Eighth Circuit's finding (Appendix at A106-27), this case must be remanded to the trial court to avoid manifest injustice.

This Court recently has reaffirmed the non-movant's responsibility to come forward with sufficient evidence to require the fact finder to resolve the issue at trial. *Anderson v. Liberty Lobby*, 447 U.S. 242, ..., 106 S.Ct. 2505, 2510 (1986). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, ..., 106 S.Ct. 2548, 2553 (1986). The non-

moving party, however, is entitled to adequate time for discovery. *Celotex*, 106 S.Ct. at 2552-53. When a non-movant is presented with an issue for the first time on appeal, the non-movant is denied not only adequate time for discovery, but also access to a proper forum in which to present evidence of a factual dispute. The state is prepared to present sufficient evidence to demonstrate the existence of a factual dispute regarding the meaning of "damages" in the insurance industry. Remand to the trial court is necessary to provide this opportunity.

B. Remand To The Trial Court For A Factual Determination Is Necessary Before Any Court Can Conclude That The Term "Damages" Has A Narrow, Technical "Plain Meaning" In The Insurance Context That Differs From Its Broader, Ambiguous Meaning To Lay Policyholders.

The Eighth Circuit's ruling amounts to a decision that in the insurance industry there is a special custom and usage of interpreting the term "damages" differently than in other contexts.[17] The existence of custom and usage in a particular context, however, is a factual inquiry. *Transportation-Commun. Emp. U. v. Union Pac. R. Co.*, 385 U.S. 157, 163, 87 S.Ct. 369, 373 (1966) (quoting *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566-67, 66 S.Ct. 322, 325 (1946)) (interpreting collective bargaining agreements). This includes the insurance context. *Home Ins. Co. v. Aetna Cas. & Sur. Co.*, 528 F.2d 1388 (2d Cir. 1976) (understanding and custom of the insurance industry regarding the meaning of "batch

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17. *See*, Restatement (Second) Contracts § 219, comment a and § 220, comment a ("usage" is a habitual or customary practice of interpretation that may prevail in a special trade or other group; usage gives particular meaning to an agreement). *See also*, J. Appleman & J. Appleman, *Insurance Law and Practice*, § 7388 at 187 (1976) (discussing practices in the insurance industry as usage of trade).

clauses" are issues of material fact precluding summary judgment).[18] Putting aside the question whether it was appropriate for the court of appeals to apply an interpretation peculiar to the insurance industry after finding that to a layperson the term would include the cleanup costs at issue,[19] the existence and effect of a custom and usage in the insurance context requires factual support.[20]

The Eighth Circuit fails to cite a single fact supporting its decision to treat the term "damages" in the insurance context differently than in other contexts. This failure is not surprising because no factual record was developed on this point in the trial court. None was appropriate. Continental did not raise any issue in the trial court about the meaning of "damages" and conceded numerous times that the claims in question were "damages."[21]

Under Rule 56(c), summary judgment may be entered only if the facts and evidence before the trial court demonstrate that there is no "genuine issue as to any material fact." Fed. R. Civ. P. 56(c). In the absence of essential factual support it was inappropriate for the Eighth Circuit to affirm summary judgment based on the assumption that the term "damages" has a narrow, technical meaning in the insurance context.

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18. *See* J. Appleman, *supra*, § 7388 ("Where no evidence as to custom is shown or where no custom is found to exist the rights of the parties will be determined strictly from the contract." *Id.* at 184-85. "[W]ords used in insurance contracts are to be understood according to their ordinary scope and meaning unless a more restricted use is established by general mercantile usage, or expressly brought to the notice of both 'parties.'" *Id.* at 185).

19. *See* discussion in Part II., *infra*.

20. Under Missouri law, parol evidence is appropriate to determine the technical meanings of contract terms that are peculiar to certain occupations. *Busch & Latta Painting Corp. v. State Highway Comm'n*, 597 S.W.2d 189, 202-03 (Mo. App. 1980).

21. *See* note 10, *supra*.

Indeed, summary judgment frequently is denied in insurance coverage cases because of issues of fact about whether the underlying claim is within the scope of the insurance policy. Determining coverage frequently involves "questions requiring the construction of the policy in light of the parties' understanding and customs of the insurance industry." 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2730.1 at 293. "When evidence of the custom and usage of the trade is required in order to interpret an agreement, the Rule 56 motion will be denied." *Id.* at 284.

The Eighth Circuit circumvented these long-standing principles by affirming summary judgment on the basis of a factual finding for which it had no factual support. The state is prepared to contest the court's finding, however, as discussed in Subpart I.C. The existence of this disputed factual issue renders summary judgment improper under Federal Rule of Civil Procedure 56(c). The cause should be remanded to the trial court for a factual hearing to determine whether, indeed, there exists in the insurance industry a custom and usage or technical meaning of the term "damages."

C. Insurers Regularly Have Described Environmental Cleanup Costs And CERCLA Cost Recovery Claims As "Damages," Precluding A Finding That In The Insurance Context The Term Has A "Plain Meaning" That Excludes Those Costs.

Available evidence[22] demonstrates that the insurance industry as a whole and Continental in particular have

22. This Court, of course, is not the appropriate forum in which to present new evidence to resolve this factual dispute. This discussion of evidence is presented to demonstrate the types of facts, documents and testimony that are available to determine, upon remand to the district court, whether the insurance industry has attached a narrow, technical meaning to the term "damages."

interpreted the term "damages" to include equitable monetary relief such as environmental cleanup costs. Thus, the term does not have a specialized, narrow "plain meaning" in the insurance context that differs from its broader meaning to laypersons.

Continental itself in the trial court explicitly referred to the underlying claims as claims for "damages."[23] Continental did not even raise the question whether governmental claims under CERCLA for reimbursement of hazardous waste site cleanup costs constituted "damages" until rehearing before the Eighth Circuit. Certainly Continental has not attached a "plain meaning" to the term "damages" that precludes its application to such claims.[24]

The insurance industry as a whole also has not applied the narrow, technical "plain meaning" of the term "damages" attributed to it by the Eighth Circuit that would preclude the term from providing coverage for environmental cleanup costs.[25] The minutes of an October 28, 1969 meeting of the Insurance Rating Board General Liability Governing Committee[26] describe a dis-

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23. *See* note 10, *supra*.

24. Under Missouri law, such a practical construction by the insurer of the meaning of a policy term is given great weight in interpreting the policy and is binding upon the insurer. *Aetna Casualty & Surety Company v. Haas*, 422 S.W.2d 316, 320 (Mo. 1968).

25. The court stated, "The dispositive issue is whether the term 'damages' in the standard-form CGL policy includes cleanup costs." Appendix at A13.

26. The Insurance Rating Board was the successor to the National Bureau of Casualty Underwriters and the predecessor to the current Insurance Services Office. These organzations for decades have developed standard-form CGL policies that are used throughout the property and casualty insurance industry. For a discussion of the drafting history of standard-form CGL insurance policies, see *American Home Products Corp. v. Liberty*

(Continued on following page)

cussion of pollution exclusion clauses then being proposed for inclusion in the insurance industry's standard-form CGL policies. Expressing concern about the effect on the insurance industry of several then-recent off-shore oil spills, the minutes state, "Damages, *including the cost to clean up*, may be catastrophic." Appendix at A115. (Emphasis added.) Clearly, in 1969 the insurance industry understood that environmental cleanup costs were "damages."[27]

This understanding continues today. The 1984 Insurance Services Office Commercial General Liability Occurrence Form includes a specific exclusion for environmental cleanup costs (Appendix at A120) which would not be necessary if the industry had a clear understanding that the "plain meaning" of the term "damages" does not include environmental cleanup costs.[28]

In addition, Richard E. Stewart, who formerly was a Senior Vice-President and Director and Chief Financial Officer of the Chubb Group of Insurance Companies

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Footnote continued—

Mutual Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), and Chesler, Rodburg, and Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 14-16 (1986).

Expressions by the policy drafters of the terms' intent have been accepted as evidence of policy meaning in numerous cases. *American Home Products, supra; Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *Kipin Industries, Inc. v. American Universal Ins. Co.*, No. C-860658 (Ohio Ct. App., 1st Dist. Aug. 12, 1987) (Available in Westlaw and Lexis databases).

27. This is but one of thousands of pages of documents containing expressions of the insurance industry's understanding of the meaning of its standard policy forms.

28. *Cf. CPS Chemical Co., Inc. v. Continental Ins. Co.*, 222 N.J. Super. 175, 536 A.2d 311 (App. Div. 1988).

and a former Superintendent of Insurance for the state of New York, on March 7 and 8, 1988 testified that the term "damages" in standard-form CGL insurance policies includes environmental cleanup and CERCLA response costs and that such expenses are covered under the policies. Appendix at A121-27.

This evidence, along with other evidence that is available and can be developed through discovery, makes clear that, like the lay policyholders described by the Eighth Circuit, both Continental and the insurance industry use the term "damages" to "include all monetary claims, whether those claims are described as damages, expenses, costs or losses." Appendix at A17-18. Like the policyholders' understanding, the insurance industry's meaning of "damages" certainly is broad enough to encompass equitable monetary claims under CERCLA to reimburse governmental hazardous waste site cleanup costs.

This evidence provides significant support for the state's interpretation of the term "damages" in Continental's policies. It need not be conclusive; it demonstrates that facts supporting the state's interpretation exist. At the very least, the evidence raises an issue of material fact, making improper summary judgment under Rule 56(c).

It would be unfair in the face of this available evidence to deny the state the opportunity to develop such evidence and present it to a fact finder. The unfairness particularly is acute here because the state had no indication in the district court that Continental would assert this basis as a limitation on its coverage to NEPACCO. Accordingly, this case should be remanded to the trial court for a factual determination.

II. The Eighth Circuit Misapplied the Erie Doctrine By Ignoring Missouri Rules Of Insurance Policy Construction Under Which Policy Terms Are Interpreted As They Would Be Understood By A Layperson And Instead, Interpreting The Term "Damages" According To A Technical Meaning Applied By Laws Of Other Jurisdictions.

As agreed by all parties and the Eighth Circuit, and under the choice of law doctrine set out in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938), the Eighth Circuit was bound to apply the substantive law of Missouri to determine whether the term "damages" includes environmental cleanup costs. Missouri principles of insurance policy construction lead inarguably to the conclusion that such claims come within the term "damages." The Eighth Circuit, however, did not follow Missouri law. Instead, it followed conflicting law of other jurisdictions. This violated the Eighth Circuit's duty under *Erie* and imposed the law of a foreign jurisdiction upon the state of Missouri.

In a diversity action, a federal appellate court must ascertain and apply state substantive law whenever it is controlling. *Huddleston v. Dwyer,* 322 U.S. 232, 64 S.Ct. 1015 (1944). The Eighth Circuit should have applied Missouri law even if it believed the law was wrong or contrary to the great weight of authority elsewhere. *West v. AT&T,* 311 U.S. 223, 235-36, 61 S.Ct. 179, 182-83 (1940).

In Missouri, the rules of insurance policy construction are clear. Policy terms are interpreted as they would be understood by a lay policyholder, not as they might be interpreted by persons well-versed in the insurance industry. *Robin v. Blue Cross Hospital Services,*

Inc., 637 S.W.2d 695, 698 (Mo. *en banc* 1982); *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 27 (Mo. 1969) (layman's definition will be applied over a technical definition); *Stafford v. Travelers Ins. Co.*, 530 S.W.2d 23, 25 (Mo. App. 1975) (same principle). Moreover, ambiguous policy terms are construed against the insurer, *Robin, supra,* and "[a]n insurance contract reasonably susceptible of *any* interpretation favorable to the insured will be so construed." *Bellamy v. Pacific Mut. Life Ins. Co.*, 651 S.W.2d 490, 495 (Mo. 1983) (emphasis added).

The Eighth Circuit correctly noted that the term "damages" is ambiguous to laypersons outside the insurance industry and broad enough to include governmental claims for reimbursement of CERCLA hazardous waste site cleanup costs. Appendix at A17-18. Based upon Missouri's rules of insurance policy construction, this should have ended the inquiry. The court should have ignored the narrow, technical definition. *Wheeling Stamping Co. v. Birdsboro Steel Foundry & Machine Co.*, 245 F.2d 752 (3d Cir. 1957) (state rules of construction are to be used by federal court when state law applies).

In choosing to adopt the narrow, technical definition of "damages," the Eighth Circuit did not cite a single Missouri case. Primarily, the court relied upon *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 703 (1988), decided under Maryland law. Maryland does not apply the rule, applicable in Missouri and elsewhere, that insurance policy terms are construed most strongly against the insurer.[29] Moreover, the Fourth Circuit in *Armco* noted that "Mary-

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29. *Compare Robin*, 637 S.W.2d at 698, with *Truck Ins. Exchange v. Marks Rentals, Inc.*, 288 Md. 428, 418 A.2d 1187, 1191 (1980).

land law . . . has . . . adopted the somewhat narrow, technical definition of damages." *Id.* at 1352 (citing *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435 (D. Md. 1977)). The Eighth Circuit also cited cases applying the laws of Florida and New Hampshire. Reliance on these cases is an abandonment of controlling Missouri law in favor of law established in other jurisdictions.

Regardless of how other jurisdictions have ruled,[30] the Missouri Supreme Court would include cleanup costs within the term "damages." Indeed, the Missouri Supreme Court has held that restoration costs incurred to put property in its former condition, which are analogous to costs incurred to clean up environmental contamination, are recoverable as damages. *Jack L. Baker Co., Inc. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268 (Mo. 1967). *See also, Zipkin v. Freeman*, 436 S.W.2d 753, 761 (Mo. *en banc* 1968) ("The word 'damages' is not limited to any particular kind of damage or injury . . ."). Given these principles, and given Missouri's rule of construing insurance policies as they would be understood by the lay policyholder, there is no basis upon which to conclude that the Missouri Supreme Court would rule that governmental claims for reimbursement of hazardous waste site

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30. As the dissent correctly notes, there is a split in authority among those jurisdictions that have considered whether the CGL policy term "damages" includes governmental claims for reimbursement of hazardous waste site cleanup costs. Appendix at A25-26. The majority also recognizes this split, citing cases contrary to its decision here. Appendix at A18-19 (citing *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *U.S. Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983); *Broadwell Realty Services Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76, 82-83 (App. Div. 1987)). Thus, the issue of whether monetary claims for equitable relief can be claims for "damages" under liability insurance contracts is by no means a settled point of "black letter law" as characterized by the majority. Appendix at A18.

cleanup costs are not "damages" under standard-form CGL policies merely because such claims have been characterized as "equitable."

Clearly, the Eighth Circuit's abandonment of Missouri law was improper and constituted reversible error. Therefore, this Court should grant this petition, reverse and remand for an appropriate application of Missouri law.

III. The Issues Presented In This Case Are Material And Of Substantial Importance To The State Of Missouri As A Claimant Seeking To Recover Environmental Cleanup Costs From NEPACCO And Others, And To The Federal And State Governments Who Have Similar Claims Pending.

The state of Missouri has established a hazardous waste remedial fund administered by the Missouri Department of Natural Resources. Section 260.480.1 R.S.Mo. (1986). Missouri uses this fund to pay for the costs of conducting hazardous waste site cleanup activities when no responsible party will undertake the cleanup. In addition, this fund pays for Missouri's share of the cost of cleanups financed by the federal Superfund.[31] When Missouri is compelled to spend money from its hazardous waste remedial fund, it seeks to replenish its fund by recovering those costs from responsible parties pursuant to state and federal law, including CERCLA.

The circumstances surrounding NEPACCO provide a good example. To recover its costs in responding to contamination caused by NEPACCO's wastes at Times Beach, Missouri, the Minker/Stout/Romaine Creek site,

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31. Under CERCLA, states must pay at least 10 percent of the cost of many environmental cleanup activities conducted within their borders and paid for by the Superfund. CERCLA § 104(c)(3)(C), 42 U.S.C. § 9604(c)(3)(C).

and the Russell Bliss farm site, the state of Missouri has pursued claims against NEPACCO and others in three lawsuits. *See* note 6, *supra*. NEPACCO is defunct,[32] and the only known sources from which NEPACCO's liability to Missouri can be paid and the state's fund replenished are NEPACCO's insurance policies.

As of January 1, 1988, 51 hazardous waste disposal sites throughout the state of Missouri had been classified as abandoned or uncontrolled hazardous waste disposal sites pursuant to Missouri law.[33] Like NEPACCO, the liable parties at many of these sites are defunct and their standard-form CGL insurance policies containing the same provisions as NEPACCO's are the only source from which Missouri can recover even a portion of its cleanup costs. Under the Eighth Circuit's interpretation of the term "damages" in the standard-form CGL insurance policy, those potential sources of reimbursement suddenly have evaporated.

The adverse effect of the Eighth Circuit's decision is not limited to the state of Missouri, or even to states within the Eighth Circuit's jurisdiction. The Eighth Circuit's factual finding that in the insurance context the term "damages" has a narrow, technical meaning that does not include governmental claims under CERCLA for reimbursement of hazardous waste site cleanup costs already is being cited by insurance companies throughout the nation seeking to avoid providing coverage under the standard-form policies they issued to companies liable

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32. *See* discussion at note 5, *supra*, and Appendix at A8.

33. Section 260.440 R.S.Mo. (1986). *See* Confirmed Abandoned and Uncontrolled Hazardous Waste Disposal Sites in Missouri, Fiscal Year 1987 Annual Report (Missouri Department of Natural Resources 1988).

for such costs.[34] It is improper and unfair to allow to stand the factual finding—undeveloped in the trial court and unsupported by any record before the district court or the Eighth Circuit—that in the insurance context there is a narrow, technical "plain meaning" of the term "damages" that differs substantially from the term's broader, ambiguous meaning to the public at-large.

CONCLUSION

There can be no doubt that the Eighth Circuit in this action committed error. First, it leaped to an unsupported—and unsupportable—factual conclusion that in the insurance context the term "damages" has a narrow, technical meaning that does not include environmental cleanup costs. Even if the Eighth Circuit had been inclined to believe that "damages" should have a specialized meaning in the insurance context, it is not the role of the appellate court to hold that such a meaning exists until presented with a trial court finding and with testimony, documents and other evidence developed in the trial court to support such a factual finding. The Eighth Circuit should have remanded to the district court for development of evidence to determine whether, indeed, there exists a narrow, specialized meaning of the

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34. *See, e.g.*, "Appellate Court Denies Cover for Cleanup Costs," *Business Insurance*, March 7, 1988, pp. 1, 100 (statement of Barry Ostrager). The potentially widespread effect of this decision is demonstrated by noting that the U.S. Environmental Protection Agency has listed or proposed for listing more than 1,000 hazardous waste disposal sites in all fifty states on its National Priorities List, a list of sites potentially eligible for cleanup with money from the Superfund, 52 Fed. Reg. 27,620, *et seq.* (July 21, 1987). For a discussion of the pervasive nature of asserted and potential claims based on hazardous waste site liability costs, and the role of insurance coverage in helping to shoulder the burdens of that liability, *see* Chesler, at note 21, *supra*.

term that differs from its broader, ambiguous meaning to laypersons. Permitting appellate courts to affirm a drastic remedy such as summary judgment on the basis of a factual issue never presented to the trial court and a factual finding unsupported by the record denies the non-moving party the opportunity to respond to the factual issue in the proper forum. Such action circumvents the basic principles of appellate review and renders summary judgment a tool to unfairly and permanently foreclose the opportunity to a full and fair hearing.

Second, the Eighth Circuit failed to follow the requirements of the *Erie* doctrine. It did not apply the Missouri rule of insurance policy construction under which an insurance policy must be interpreted as a layperson would understand it. The Eighth Circuit conceded that to a layperson the term "damages" is ambiguous and would include environmental cleanup costs. Under the Missouri rule of insurance policy construction, that finding should have ended the inquiry. Instead, the court reached out to find and apply the laws of other forums which rely on different rules of interpretation. In so doing, the Eighth Circuit ignored the fundamental principles set forth by this Court in *Erie*.

The cost of these errors is high. The rule established by the Eighth Circuit denies the state of Missouri any opportunity to replenish its hazardous waste remedial fund for costs it has incurred for which NEPACCO is responsible. Moreover, it adversely affects the ability of Missouri, other state governments and the federal government to secure reimbursement from proceeds of CGL insurance policies with identical terms issued to companies throughout the country.

WHEREFORE, the state of Missouri prays this Court grant the state's petition for *certiorari* to review the Eighth Circuit's judgment.

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